

STATEMENT

William REINSCH *

1. Introduction

Throughout the Conference there have been a number of inquiries about the status of S. 958 and the likelihood of its enactment. A hearing was held on the bill on January 29, 1982, and no public statements have been made about the bill since that time.

Following the hearing, Senator Heinz decided to redraft the bill to make it an amendment to Title VII of the Tariff Act of 1930 rather than an amendment to section 406 of the Trade Act of 1974. Although that decision was technical rather than substantive, it necessitated considerable redrafting in order to make the bill conform to the kinds of procedures established for antidumping and countervailing duty cases. Additional delays stemmed from the fact that the same Commerce Department personnel were working on both the bill and the numerous steel industry unfair trade practices cases.

During the drafting process, many discussions were held with interested private sector parties and with government agencies. Those discussions produced controversy regarding three aspects of the bill.

2. Removal of the current section 406 process

Some support existed for retaining the current process for finding market disruption as an alternative to the new process created by section 958. The revised draft addresses this problem by leaving current section 406 untouched.

3. Injury test

Section 958, as originally drafted, did not deal adequately with the problem of providing an injury test. In discussions with the Reagan Administration, we agreed on a formula for all countries other than the People's Republic of China

* Chief Legislative Assistant to Senator John Heinz of Pennsylvania.

(the "PRC"). As redrafted, the bill provides an injury test for General Agreement on Tariffs and Trade ("GATT") members. Some in the Administration proposed extending the injury test to cover countries that had accepted obligations equivalent to GATT obligations. The question currently under discussion is whether the PRC has accepted such equivalent obligations. Other than the PRC case, the Administration seems content with limiting the injury test to GATT members.

4. Price standard

As originally drafted, section 958 provided for a comparison of the price of the nonmarket economy (the "NME") good with that of the lowest average price free-market producer. Any duty assessed would have to be in an amount sufficient to raise the former to the level of the latter. While the standard has received some criticism from NMEs because of its implicit rejection of the possibility that NME producers could be the most efficient producers, it has received more criticism from domestic industries that believe the standard is too low. This attack, led by the domestic steel industry, has suggested that nonmarket production costs are in fact far higher than those of free-market producers. Thus, section 958, by permitting sales down to the level of the lowest priced free-market producer, provides more of a benefit to the NMEs than current law, which makes a determined (albeit inevitably inaccurate) attempt to ascertain actual costs. As an alternative, these critics have proposed comparing the NME's price with the *average* price of free-market producers, a standard that, in some cases, would be higher than that mandated in section 958.

The revised draft, currently in circulation for comment, maintains the standard of the original section 958. However, this does not reflect a policy decision to retain the standard. It was kept the same only to facilitate the technical aspects of the redraft. Once comments are received on the draft, this issue, along with the first two discussed, will be decided by Senator Heinz. A fresh draft of the bill will then be made public.

Several of the comments made about section 958 erroneously suggest that the contemplated procedure is little more than a kind of price maintenance similar to the former trigger price mechanism (the "TPM") for steel that existed on and off from early 1978 to early 1982. The TPM was essentially an administrative device designed to alert the Commerce Department to possible violations of the Antidumping Act. Trigger prices, based on Japanese production costs, were published quarterly for a wide variety of steel products. Since it was assumed that the Japanese were the most efficient producers, sales below Japanese costs were regarded as a good indication that dumping existed.

However, the TPM system did not result in a finding of dumping or in any penalties. It merely caused an antidumping investigation to begin.

In practice, trigger prices functioned both as a price floor and a ceiling. Importers knew that sales below TPM levels were suspect and could lead to an investigation, so they had an incentive to keep their prices at or above TPM levels. Domestic producers knew that if their prices rose more than 10–15% above TPM levels, they would start losing sales to imports. Thus, the TPM levels also provided an effective ceiling on domestic prices which tended to rise with quarterly increases in trigger prices.

Section 958, however, is not a prospective price maintenance scheme. It would be similar to the antidumping and countervailing duty laws in that there would be no ongoing monitoring of imports or of import prices. If a specific petition was filed, the case would be conducted in much the same way as an antidumping or countervailing duty case.

Any antidumping system may be criticized as a form of price maintenance because the investigation requires a determination of “fair value” and stipulates that duties will be assessed on sales below fair value to bring them up to that level. Section 958 does not deviate from that general process but differs in the way it arrives at fair value. The calculation of fair value in section 958 is more certain and easier to determine because it is based on comparisons with actual prices in the market-place rather than on some abstract construction of production costs. Consider the Polish golf cart case which used factor prices from Spain, a country without any real production of equivalent products.

In fact, the debate over section 958 has not revolved around the certainty of the calculation or the ease of determining it. The central issue is whether the value determined is in fact a “fair value”. Proponents as well as critics of the bill have attacked the likely outcomes of the process as being either too high (from the NME’s perspective) or too low (from the domestic industry’s perspective).

Under these circumstances, it is tempting to suggest that the proposal may in fact be quite accurate, since it is being attacked by parties from both ends of the spectrum. Senator Heinz’s contention from the beginning, however, has been that the proposed system is superior because it is impossible to determine with any degree of accuracy what production costs are in a NME. Any effort to do so is therefore subject to extended criticism and litigation. It is sounder public policy to adopt a system that is widely understood, easily calculated, and generally regarded as fair. We believe section 958 meets that standard.